

## ORAL ARGUMENT NOT YET SCHEDULED

Case No. 14-1185

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Laura Sands,

*Petitioner,*

v.

National Labor Relations Board,

*Respondent,*

United Food & Commercial Workers, Local 700,

*Intervenor.*

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**On Petition for Review of a Decision  
and Order of the National Labor Relations Board**

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**PETITIONER'S REPLY BRIEF**

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\* Authorities upon which we primarily rely are denoted by an asterisk.

## **GLOSSARY OF ABBREVIATIONS**

National Labor Relations Act (“NLRA” or “Act”)

National Labor Relations Board (“NLRB” or “Board”)

United Food & Commercial Workers (“UFCW” or “Union”)

Joint Appendix (“JA”)

Communications Workers of America (“CWA”)

## INTRODUCTION AND SUMMARY OF ARGUMENT

The National Labor Relations Board (“Board”) concedes its decision must be overturned under current circuit precedent. To counter a certain reversal, the Board now seeks a hearing *en banc* to overturn this Court’s decisions in *Abrams v. Communications Workers of America*, 59 F.3d 1373 (D.C. Cir. 1995), and *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000), under the theory that the guarantees of “fundamental fairness” protected in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 306 (1986) do not extend to nonmember “employees who have yet to decide whether to pay the full amount of union dues.” Board Br. 14. As explained in Sands’ opening brief, the Board’s position is inconsistent with the United States Supreme Court’s clear commands in *Hudson* and every single post-*Hudson* decision to come before a federal court, including the Supreme Court’s own decision in *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277 (2012). Thus, even if *Penrod* and *Abrams* did not exist, the Board’s position lacks merit.

Moreover, the record does not support the Board’s position in this case. The Board’s *ipse dixit* argument against requiring the United Food & Commercial Workers (“Union”) to produce its reduced chargeability percentage in its initial notice is that “small unions” will be “burdened.” But here, there was no burden whatsoever on *this* Union. This case concerns a large union with an even larger international affiliate, both of which had their reduced chargeability percentages

readily available and would have suffered no burden by simply including that information in their initial notice under *Communications Workers of America v. Beck*, 487 U.S. 735 (1988). This imaginary “burden” cannot trump employees’ fundamental rights, at least not in this case.

The Union claims the Board and this Court have misread *Abrams* and further developments in Board law necessitate a rethinking of *Penrod*. *Abrams*, however, correctly recognized that *Hudson*’s requirement of “fundamental fairness” applies to employees in the private as well as the public sector, and subsequent Board cases striking down “annual objection” requirements are wholly extraneous.

The Union argues that Sands lacks standing to bring this appeal. The Board, however, does not join in the Union’s argument, and for good reason: Sands has standing as she is an aggrieved party who lost before the Board and is entitled to the longstanding notice posting remedy. The Board’s order must be reversed.

## ARGUMENT

### **I. *PENROD* AND *ABRAMS* WERE CORRECT IN APPLYING *HUDSON*’S REQUIREMENT OF “FUNDAMENTAL FAIRNESS” IN ALL AGENCY FEE COLLECTION SYSTEMS. THE BOARD’S FAULTY POSITION TO THE CONTRARY CONTRAVENES EVERY RELEVANT DECISION BY THE FEDERAL COURTS.**

The Board cannot cite a single court that has limited *Hudson*’s disclosure mandate only to those “already objecting.” The Board’s cribbed *Hudson* decision

is not only wrong on its own terms, but also directly conflicts with every single *Hudson* decision in the federal courts.

It is long-settled law that *Hudson* requires a union enforcing a compulsory dues clause to provide notice to employees who have never registered an objection to paying for a union's political expenditures, precisely so they can make an informed decision, not "in the dark." 475 U.S. at 306. "The purpose of the *Hudson* notice is to provide employees with adequate information so that they may decide *whether* to object or to challenge the Union's calculation." *Cummings v. Connell*, 316 F.3d 886, 895 (9th Cir. 2003) (emphasis added). "Ordinarily, if there is a proper *Hudson* notice, the employee has the burden to object to paying the full nonmember fee, and only then is entitled to a refund of the nonchargeable portion of the fee." *Id.* at 894. "An inadequate notice gives fee payers insufficient information with which to decide whether or not to object to paying portions of the fee that are unrelated to representational activities." *Wagner v. Prof'l Eng'rs in Cal. Gov't*, 354 F.3d 1036, 1041 (9th Cir. 2004). "[I]t would be unfair to require a nonmember to object when the nonmember has, as a matter of law, not been adequately informed of the facts." *Id.* at 1043 As the Ninth Circuit put it:

The fundamental right at issue is the right to be informed before making a choice whether to pay for non-chargeable expenditures; to honor that right, proper *Hudson* notice is required. Basic considerations of fairness, as well as concern for the First Amendment rights at stake, . . . dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee.

*Id.* (citing *Hudson*, 475 U.S. at 306) (internal quotations omitted); *see also Tierney v. City of Toledo*, 824 F.2d 1497, 1503 (6th Cir. 1987) (“This information must also be disclosed to all non-members whether or not they have yet objected to the union’s ideological expenditures.”); *Damiano v. Matish*, 830 F.2d 1363, 1370 (6th Cir. 1987) (the notice must be provided to all potential objectors in advance, and it “must inform the non-union employee as to the amount of the service fee, as well as the method by which that fee was calculated”); *Otto v. Penn. State Educ. Ass’n*, 330 F.3d 125, 128 (3d Cir. 2003) (“without the *Hudson* notice, a non-member would lack a basis for deciding whether to object to a fair-share fee calculation”) (citing *Penrod* with approval); *Locke v. Karass*, 382 F. Supp. 2d 181, 187 (D. Me. 2005), *aff’d*, 498 F.3d 49 (1st Cir. 2007), *aff’d*, 555 U.S. 207 (2009) (noting *Hudson* held “the union should have provided details of the fee calculation to all nonmembers regardless of whether they filed an objection to the fees”); *Liegmann v. Cal. Teachers Ass’n*, 395 F. Supp. 2d 922, 928 (N.D. Cal. 2005) (rejecting claim that *Hudson* notice must only be given to *actual union members*, stating “the Supreme Court’s reference to ‘potential objectors’ . . . simply refers to nonmembers *who could be objectors*”) (emphasis added). Against this federal judicial unanimity, the Board majority stands alone in claiming that *Hudson*’s disclosure requirements do not apply to all “potential objectors,” *i.e.*, employees

who must choose between joining the union and paying full dues versus not joining and paying reduced financial core fees.

The Supreme Court's recent decision in *Knox*, 132 S. Ct. 2277, further decimates the Board's artificial limitation of *Hudson* to those "already objecting." In *Knox*, the Court considered whether a union's mid-year special assessment, without a new *Hudson* notice, violated the First Amendment. The plaintiffs in *Knox* included both nonmembers who had not previously objected to paying full dues—"potential objectors"—and nonmembers who were actual objectors. The Court held both groups of employees were entitled to a second *Hudson* notice regarding the mid-year assessment, to allow them a new opportunity to object. The Court noted: "*Hudson* rests on the principle that nonmembers should not be required to fund a union's political and ideological projects unless they choose to do so after having 'a fair opportunity' to assess the impact of paying for nonchargeable union activities." *Id.* at 2291 (citation omitted). Justices Ginsburg and Sotomayor concurred in the judgment, agreeing that nonmembers who did not object were entitled to both an initial *Hudson* notice as well as a new one for a special assessment. *Id.* at 2297 ("when a union levies a special assessment or dues increase . . . the union may not collect funds from nonmembers who earlier had objected to the payment of nonchargeable expenses, and may not collect funds from other nonmembers without providing a new *Hudson* notice and opportunity to

*opt-out.*”) (emphasis added). Even the two dissenters in *Knox* understood *Hudson* requires an adequate initial notice to *all* nonmembers, not just objectors, who may or may not thereafter object to paying full dues. *See id.* at 2302-06 (Breyer, J., dissenting); accord *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 182-83 (2007) (detailing *Hudson* notice to all nonmembers who must affirmatively opt-out of paying full dues).

Given every court to address *Hudson*—including the Supreme Court in *Knox*—has found that an adequate notice must be provided to all nonmembers, the Board has no tenable *de jure* basis for continuing to insist this Court was wrong in *Abrams* and *Penrod*. *See Miller v. Airline Pilots Ass’n*, 108 F.3d 1415, 1420 (D.C. Cir. 1997) (“[w]e see no reason why th[e] statutory duty of fair representation owed to nonmember agency shop employees carries any fewer procedural obligations than does a constitutional duty”). The Board’s improper confinement of *Hudson* upends years of settled law. Sands made these arguments in her opening brief, Sands Br. 25-26, but the Board’s response to these uniform precedents is silence.

## **II. THE BOARD’S NULLIFICATION OF *HUDSON* IS WRONG ON ITS OWN TERMS.**

Putting aside the uniform federal and Supreme Court precedent the Board ignores, the Board misreads *Hudson*. The Supreme Court in *Hudson* understood the distinction between “potential objectors” and actual objectors seeking to

challenge the calculation of a union's fee. Until the later decision in *Knox* questioned the validity of the objection requirement, 132 S. Ct. at 2290, the Supreme Court long adhered to the notion that even nonunion members must pay full union dues unless they object, because "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." *Machinists v. Street*, 367 U.S. 740, 774 (1961); see *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 238 (1977) (quoting *Street* in denying injunction against union from collecting full dues from all nonmembers for nongermane activities); *Railway Clerks v. Allen*, 373 U.S. 113, 118-19 (1963). The Board overlooks footnote 16 of *Hudson*, which specifically cites *Street*, *Abood*, and *Allen*'s agreement that dissent is not to be presumed—all three cases dealt with employees who had to affirmatively choose to "opt-out" before being allowed to pay reduced fees. *Hudson*, 475 U.S. at 306 n.16. *Hudson* differentiates "objectors" from "potential objectors" directly after referencing the objection requirement in footnote 16 because those potential objectors must "be given sufficient information to gauge the propriety of the union's fee." *Id.* at 306. Unlike the Board, the Supreme Court wanted to prevent all nonmembers and potential objectors from being kept "in the dark." *Id.*

*Second*, the Supreme Court understood the difference between an initial objection to the fee and a subsequent challenge to the amount of the fee. *Hudson* refers to “challenges” as distinct from “objections”:

We hold today that the constitutional requirements for the Union’s collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity *to challenge* the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

*Hudson*, 475 U.S. at 310 (emphasis added).

*Third*, *Hudson* has never been confined to the peculiarities of Illinois’ agency fee requirements existing in 1984. *Hudson* “outlined a minimum set of procedures by which a union in an agency-shop relationship could meet its requirements under *Abood*.” *Keller v. State Bar*, 496 U.S. 1, 17 (1990).

Accordingly, the rules dictated in *Hudson* apply to all compulsory fee collection systems. *See Knox*, 132 S. Ct. 2277 (applying *Hudson* to midyear assessments).

### **III. THE UNION’S DISTINCTIONS OF *ABRAMS* ARE UNAVAILING AND WERE REJECTED BY THIS COURT IN *PENROD*.**

#### ***A. Penrod* Already Rejected the Union’s Misreading of *Abrams*.**

The Intervening Union argues that the Board majority was right to reject *Abrams* and *Penrod*, but that it did so for the wrong reasons. The Union argues that *Abrams* is not controlling because it concerned the wording of the initial *Beck* notice, rather than information about the amount of the reduced fee. Union Br. 11-18. This Court explicitly rejected the Union’s argument in *Penrod*:

In order to conclude that the wording was inadequate, however, *Abrams* had to hold that *Hudson* applies to new employees and financial core payors, and *Hudson* carries with it the requirement that unions give employees “sufficient information to gauge the propriety of the union's fee”—*i.e.*, the percentage reduction. We recognize that this means that new employees and financial core payors must be given the same information as *Beck* objectors, but *Abrams* is the law of this circuit.

203 F.3d at 48 (internal citation omitted).

Yet, the Union is now foisting the same incoherent reading of *Abrams* on this Court. Pages 11-14 of the Union’s brief intersperses quotes from the overturned district court opinion in *Abrams v. Communications Workers of America*, 818 F. Supp. 393 (D.D.C. 1993), with out-of-context quotes from this Court’s decision, to make it appear as though this Court consciously approved of an “initial *Beck* notice” containing no financial information about the union’s reduced fee calculation. The Union’s discussion of *Abrams* is misleading, because the most that can be said is that *Abrams* did not directly rule on the specific issue of financial disclosure in the initial notice because it was not raised on appeal from the district court. *See Penrod*, 203 F.3d at 48; *but see Abrams*, 59 F.3d at 1379 n.6 (“potential objectors must be given sufficient information to gauge the propriety of the union’s fee”) (quoting *Hudson*, 475 U.S. at 306).

The Union concedes that in *Abrams*, the Communications Workers of America’s (“CWA”) initial notice, in fact, contained “an estimation of the approximate portion of CWA expenditures that were chargeable and

nonchargeable.” Union Br. 19, 28. Thus, CWA’s potential objectors were not left completely in the dark about the amount of the reduced fee, as Sands was under the regime approved by the NLRB in this case. More important, because CWA’s initial notice contained at least rudimentary information about the amount of the fee reduction, 818 F. Supp. at 397, the nonmembers in *Abrams* did not raise that issue on appeal. (The Court can take judicial notice of the briefs filed in Case Nos. 93-7171 and 7172 to verify this). Finally, when CWA informed this Court in *Abrams* that it had created an additional notice for new hires, the Court explicitly refrained from deciding the extent to which that additional notice had to contain the *actual* percentage reduction, stating:

Although CWA represented at oral argument that new employees receive some further notice at the time of hiring, we cannot determine from the policy language or elsewhere in the record whether the notice is timely and adequate. Accordingly, we will remand to the district court for further findings on this issue.

59 F.3d at 1380-81 (emphasis added).

Thus, the Union’s bald argument that *Abrams* “rejected the claim that such information needs to be included in the initial notice” is false. Union Br. 4, 18. Moreover, like the Board majority, the Union’s brief also ignores the uniform post-*Hudson* rulings that decide this very issue. *See, supra*, 2-6 (describing *Hudson* as interpreted by the federal courts).

**B. The Board's Rejection of "Annual Renewal" Requirements Has No Impact on This Case.**

The Union advances a bizarre claim that *Penrod* and *Abrams* should be reconsidered by this Court because the Board struck down so-called "annual renewal" requirements in *Machinists Local Lodge 2777 (L-3 Communications Vertex Aerospace LLC)*, 355 NLRB 1062, 1069 (2010). The claim is preposterous because *L-3 Communications* does not speak to the standards governing an initial *Beck* notice, and is completely unrelated to this case. The Union's additional claim that all disclosure requirements should be reconsidered because "it is literally impossible to predict the precise figure that objectors will be charged in future years" is also off base. Union Br. 23-24. *Hudson* and *Beck* notices and disclosure are based on a union's most recent accounting year, not future expenditures. *Hudson*, 475 U.S. at 307 n.18 ("the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year"). *Sands* does not demand that a union look into a crystal ball and estimate its future expenditures in its initial notice. A union simply has to give the percentage reduction based on its most recent accounting year, something that is readily available to almost every union in America.

**IV. *CHEVRON* DEFERENCE CANNOT SAVE THE BOARD'S DECISION BECAUSE IT IS IRRATIONAL.**

The Board and Union both claim *Chevron* deference would save the Board majority's decision. In truth, it does not matter whether deference is or is not applied to the Board's decision below, because it conflicts with *Hudson* and all basic notions of "fundamental fairness." A Board decision that conflicts with *Hudson*'s basic procedural requirements is *per se* irrational. See *Ferriso v. NLRB*, 125 F.3d 865, 869 (D.C. Cir. 1997). In *Ferriso*, this Court applied *Chevron* deference to the question of whether an independent audit is required in a *Beck* financial disclosure statement, but still reversed the Board, finding that its "rejection of the 'independent auditor' requirement was not rational, because ... the Board was mistaken in finding that *Hudson*'s 'basic considerations of fairness' language did not extend to its 'independent auditor' requirement." *Id.* Thus, even under *Chevron* deference, the Board's decision keeping nonmembers in the dark and denying them any meaningful initial notice must fall.

Both the Board and Union rely on *Thomas v. NLRB*, 213 F.3d 651 (D.C. Cir. 2000) to support their claim that there is somehow a conflict within this Circuit that necessitates reconsideration of *Abrams* and *Penrod*. Union Br. 9-10, 24; Board Br. 17-19. Yet, *Thomas* actually supports Sands' claim. In *Thomas*, this Court remanded one of the petitioners' claims to the Board to determine the proper remedy for his discharge because his initial *Beck* notice did not include the

percentage reduction if he chose to become a *Beck* objector. 213 F.3d at 655-56.

*Thomas* engaged in no extended discussion regarding the level of deference needed, but rather applied *Penrod* and ordered the Board to do the same. Thus, *Thomas* is part and parcel of this Court mandating the Board's compliance with *Hudson*. See also *Penrod*, 203 F.3d at 48; *Ferriso*, 125 F.3d at 869-70.

**V. THE BOARD'S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**

**A. The Evidence Shows Compliance with *Hudson* Would Have Posed No Burden to the Union.**

Even assuming there is an open question concerning *Hudson*'s meaning, and even assuming deference is applied to the Board's constricted views, there is no evidence in the record to support the Board's view. The Board rejects *Penrod* and *Abrams* because it believes any financial disclosure requirement will burden "small unions." This case, however, does not deal with a small union; it deals with a large local union and an even larger international union with over \$208 million in total assets.<sup>1</sup> The UFCW had, at its fingertips, the percentage reduction information required by *Beck* and *Hudson*, but made a conscious decision to keep Sands "in the dark" regarding the percentage of the fee when it sent her the initial notice.

*Hudson*, 475 U.S. at 306. Indeed, the Union provided Sands with its reduced fee calculation and financial audits only one day *after* receiving her objection letter.

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<sup>1</sup> Department of Lab., UFCW, LM-2 report, <http://kcerds.dol-esa.gov/query/orgReport.do?rptId=547573&rptForm=LM2Form> (last visited on May 30, 2015).

(JA 22-36). Whatever the merits of the Board's contention that *Penrod* and *Abrams* might burden "small unions," it makes no attempt to argue that *this* Union is burdened. The Board's logic is that if a prophylactic disclosure rule burdens a small union, the rule cannot apply to a large union. This is illogical, since large unions already have numerous *Beck* objectors and financial audits, and therefore can easily comply with this initial notice requirement. However, the Board never fills in the gap in its logic by showing how *Penrod* burdens *this* Union.

**B. The Board and Union Hold Conflicting Positions on Whether a Small Union Is Burdened by *Penrod*.**

The Union claims in its brief that *Penrod* and *Abrams* allow a union to comply with *Hudson*'s requirements by estimating the percentage reduction an objector will receive. Union Br. 28. The Board claims compliance with *Abrams* and *Penrod* require a full independent audit. Board Br. 36. Sands disagrees with the Union's new position—which was not raised before the Board—because if a union possesses the actual chargeability percentage, giving a different and estimated number to a potential objector is both arbitrary and in bad faith under the duty of fair representation. Moreover, if a union lacks its chargeability percentage because it has not completed a proper audit, an employee could be forced to rely on blind faith that the figure is even accurate, which is no way to "gauge the propriety of the union's fee." *Hudson*, 475 U.S. at 306. This would directly contravene *Hudson*'s admonishment against unions leaving "nonunion employees

in the dark about the source of the figure for the agency fee and requiring them to object to receive information.” *Id.*

The Union’s position, if correct, however, poses a serious problem for the Board’s position. If a small union may satisfy its notice obligations based on an estimation of past years’ expenditures without a full accounting, then it is difficult to see how there is any burden on a small union, even one that is unaffiliated with a larger international. If the Union is correct, the Board’s position further crumbles.

**C. There Is No “Small Union” Exception to *Hudson*.**

As noted in Sands’ opening brief, there has never been a “small union” exception from the general rules dictated in *Hudson*. *See Otto*, 330 F.3d at 132-33 (no small local exception to *Hudson*’s independent auditor requirement); *Andrews v. Educ. Ass’n of Cheshire*, 829 F.2d 335, 339 (2d Cir. 1987) (“the procedures mandated by *Hudson* are to be accorded [to] all nonmembers of agency shops regardless of whether the union believes them to be excessively costly”).

Moreover, federal courts have given small unions an assist by approving of “local union presumptions,” whereby small unions simply apply the reduced fee calculations of their parent affiliated union rather than their own. *Finerty v. NLRB*, 113 F.3d 1288, 1292–93 (D.C. Cir. 1997); *Thomas*, 213 F.3d at 659–60. The Union and Board both make much ado about the burden on hypothetical small

unaffiliated unions, but make no attempt to point towards any *actual* unions that would be unable to comply with this requirement.

The Board also presumes that unions are entitled to individual employees' money. *See* Board Br. 36 ("all lead to the same result: less money for the union to use toward core collective-bargaining activities"). But, as the Supreme Court stated in *Davenport*, 551 U.S. 177, forced dues collection is an "extraordinary power" and a union must comply with *Hudson*'s procedural requirements *before* it has any "entitlement to acquire and spend *other people's* money." *Id.* at 184, 187 (emphasis in original); *Tierney v. City of Toledo*, 917 F.2d 927, 937 (6th Cir. 1990) ("If [the union] cannot disclose or does not see fit to disclose to the local union how these funds are spent, then the local union may not include this \$8,500 payment in its chargeable costs. Non-members are constitutionally entitled to disclosure of these payments *prior to objecting* so that they may evaluate the basis for an objection and consequently protect their First Amendment rights.") (emphasis in original).

Simply stated, unions of any size have no right to take a "potential objector's" money, even for collective bargaining activities, until they have informed them of their choices and rights under *Beck*. If such an employee chooses to object and pay a reduced fee, a union is entitled to no money until it can produce a detailed breakdown of expenditures verified by an independent auditor. *See*

*Teamsters Local Union No. 579 (Chambers & Owen, Inc.)*, 350 NLRB 1166 (2007). The primary purpose of the *Beck* and *Hudson* regime is to protect the rights of nonmembers who may oppose union political activities. *See Hudson*, 475 U.S. at 306 (noting *Hudson* procedures are meant to protect the rights of nonmembers); *Beck*, 487 U.S. at 759 (detailing that Congress understood the NLRA grants nonmembers “protection by authorizing the collection of only those fees necessary to finance collective-bargaining activities”). This is why the Supreme Court was clear that “[l]eaving the nonunion employees in the dark about the source of the figure for the agency fee—and requiring them to object in order to receive information—does not adequately protect” the employee. *Hudson*, 475 U.S. at 306. Employees represented by “small unions” are no less deserving of this protection.

**D. Sands’ Later Objection Does Not Relieve the Union of Its Duty to Provide Her and Other Employees with Proper Notice.**

The Board claims that Sands’ eventual resignation of her union membership and her objection to paying for political activities obviate the need for the Union to provide the amount of the reduced objector fees in its initial notice to employees. Board Br. 42. This claim is erroneous. Sands was a 17-year-old grocery clerk forced to make her decision “in the dark,” who had no idea what her reduced fees would be. That she eventually resigned and objected, months after receiving inadequate and “misleading” information (JA 22), does not justify the Union’s

failure to provide adequate information in the first place. Successfully overcoming a hurdle to the exercise of a right does not mean that hurdle is just and lawful.

Employees choose to join or not join a union—or resign and object from a union—for many reasons, even including saving money. The law must be fashioned in a way that allows them to make this vital decision free of confusion and coercion. *See Hudson*, 475 U.S. at 306-07 (condemning the union practice of keeping nonmembers “in the dark”). As Sands’ and the Union’s initial exchange of letters show, she was lulled into membership and would have not joined the Union at all if it had been initially forthright about her options and the amount of the reduced fee. (JA 22). Depriving her of vital information served as an impediment to exercising her Section 7 rights, as she remained a union member for several months, during which she paid full union dues and was vulnerable to union discipline. *NLRB v. Boeing Co.*, 412 U.S. 67 (1973) (upholding disciplinary fine imposed by a union upon a member).

## **VI. SANDS HAS STANDING TO APPEAL THE BOARD’S DECISION.**

The Union claims Sands lacks standing to appeal because she is no longer employed at Kroger and because it has refunded her dues. Union Br. 4-6. The Board does not join the Union’s argument, and for good reason, because Sands has standing to appeal. *See Sands Br. 6-11.*

The Union claims, *ipse dixit*, that because Sands will never see a posted notice, she is not entitled to this remedy. But the Union does not respond to any of the citations in Sands' opening brief showing that she still has standing to pursue a notice posting remedy, even if the original charging party has left employment and cannot see it. *See NLRB v. Falk Corp.*, 308 U.S. 453 (1940) (posting assures full exercise of employee statutory rights); *see also American Fed'n of Gov't Emps., Local 3090 v. FLRA*, 777 F.2d 751, 753-54 n.13 (D.C. Cir. 1985) (availability of notice posting establishes case as live controversy); *American Fed'n of Gov't Emps., Local 1941 v. FLRA*, 837 F.2d 495, 497 n.2 (D.C. Cir. 1988) (death of employee does not moot case); *see also Department of Justice v. FLRA*, 991 F.2d 285, 289 (5th Cir. 1993) (notice posting available even after employee leaves job); *cf. NLRB v. Elec. Steam Radiator Corp.*, 321 F.2d 733, 738 (6th Cir. 1963) (Board remedial order against employer not mooted by cessation of business operation); *NLRB v. Colten*, 105 F.2d 179, 183 (6th Cir. 1939) (it is the "employing industry" to which the notice and other sanctions apply); *accord Knox* 132 S. Ct. at 2287 ("A case becomes moot only when it is impossible for a court to grant "any effectual relief whatever" to the prevailing party" . . . "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.") (internal citations omitted).

In passing, the Union cites to both *Richards v. NLRB*, 702 F.3d 1010 (7th Cir. 2012); and *Pirlott v. NLRB*, 522 F.3d 423, 433 (D.C. Cir. 2008). But both of those cases are inapposite. In both *Richards* and *Pirlott*, the charging parties won on their underlying claims before the Board. *See Richards*, 702 F.3d at 1012 (“Petitioners lack standing to bring this appeal since the NLRB struck down the annual renewal policies which were the only source of injury each Petitioner suffered”); *Pirlott*, 522 F.3d at 433 (“The Charging Parties here received the specific relief that they sought and they are entitled to nothing more. It is of no moment that the Board’s written rationale was not as far-reaching as the Charging Parties would have preferred”). Given their victories, they were not “aggrieved parties.” Here, Sands lost before the Board, making her an aggrieved party.

Contrary to the Union’s claim that Sands is seeking some “undefined relief” for the similarly situated employees, Union Br. 6, she is seeking *nunc pro tunc* relief for similarly situated employees who were denied a proper *Beck* notice. *See Sands Br. 10-11* (citing *Rochester Mfg. Co.*, 323 NLRB 260, 263 (1997) and *Newspaper & Mail Deliverers’ Union (NYP Holdings, Inc.)*, 361 NLRB No. 26 (Aug. 21, 2014)). When employees are denied a proper *Beck* notice, they are entitled to a chance to object retroactively and receive a refund of nonchargeable union expenditures. *Id.* Contrary to the Union’s claims that Sands must show injury to herself, an aggrieved party has standing to seek *nunc pro tunc* relief on

behalf of all those “similarly situated.” *See Bloom v. NLRB*, 153 F.3d 844, 849 (8th Cir. 1998), *rev’d on other grounds sub nom. OPEIU, Local 12 v. Bloom*, 525 U.S. 1133 (1999).

*Last*, even if Sands lacks standing to appeal, the Board’s decision still must be vacated under the *vacatur* doctrine. Sands noted this in her opening brief, Sands Br. 11-12 n.3, and neither the Union nor Board disputed this point. If Sands prevailed before the Board or this Court on appeal, normally she would be entitled the opportunity to object retroactively to when the Union first obligated her to pay dues, and recoup, with interest, the difference between full-dues and reduced fees. *See Rochester Mfg. Co.*, 323 NLRB at 263. *See also Abrams v. Commc’ns Workers of Am.*, 23 F. Supp. 2d 47, 52 (D.D.C. 1998) (describing *nunc pro tunc* relief). If Sands does not have third party standing or the right to a notice posting, she would have had the right to receive monetary relief. The Union, however, has refunded her all of her dues only after she filed this appeal, so she now lacks this remedy. “[V]acatur must be granted where mootness results from the unilateral action of the party who prevailed in the lower court.” *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 23 (1994). If the case is moot, it is only due to the Union’s post-decision gamesmanship, and the Board’s decision should be vacated.

## CONCLUSION

For the forgoing reasons, the Board’s Decision should be overturned.

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Date: June 1, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that on June 1, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I further certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system as they are registered users.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief contains 5,155 words in accordance with the word count typed in 14 point typeface and is in compliance with the type-volume limitations of FRAP 32(a)(7)(B) and (C) and this Court's briefing order.

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